BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	
and Competition Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity	)	
in Video Programming Distribution:	)	
Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	

REPLY COMMENTS OF AT&T CORP.

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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T"), by its attorneys, hereby files its reply comments in response to the Commission's Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The record before the Commission confirms the wisdom of Congress's assessment that the ten-year ban on exclusive programming contracts should terminate in 2002. Given marketplace realities, most especially the "major force" that DBS has become in video

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[1] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, CS Docket No. 01-290, FCC 01-307 (rel. Oct. 18, 2001) ("*Notice*").

distribution,[2] there is simply no need to extend the ban. Moreover, there is substantial cost to its continuation. The prohibition puts at risk a value that is central to the Communications Act: the continued availability of multiple and diverse sources of programming.

The parties opposing the sunset of the ban have not provided the Commission with any basis for its extension. They have ignored the special burden they must shoulder to reverse the legislative presumption. Their arguments are replete with mistaken facts and fractured economic theory. And while some anecdotes are offered up, they are so vague and unspecified that they cannot reasonably be used as "evidence" to support any Commission decision. Expiration of the ban therefore fully accords with Congress's mandate as well as sound public policy.

II. OPPONENTS OF THE SUNSET IGNORE CLEAR LEGISLATIVE COMMANDS.

A. Congress Mandated Expiration of the Ban on Exclusive Programming Contracts Unless Its Reinstatement Is Necessary.

As AT&T's Comments explained, the exclusive contract prohibition of Section 628(c)(2)(D) expires next year, as a matter of law.[3] The words and phrases of the provision -- "the prohibition . . . *shall* cease to be effective" -- show that Congress intended the prohibition to sunset *unless* extraordinary circumstances convince the Commission that it is necessary to retain the prohibition. Opponents of the sunset wholly ignore Congress's choice of linguistic form and

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[2] *See Satellite Broad. & Communications Ass'n v. FCC*, No. 01-1151, slip op. at 1 (4th Cir. Dec. 7, 2001).

[3] *See* AT&T at 3-6 (citing 47 U.S.C. § 548(c)(5) ("SUNSET PROVISION.--The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after October 5, 1992, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.")).

assume without analysis that the Commission is free to decide the issue anew. They make their arguments without any recognition of the specific burden required to overcome the statutory presumption in favor of sunset.

The precise words and phrases of the subsection make clear that the customary standards for rulemaking do not apply here. In the ordinary case, the Commission has substantial discretion to adopt a rule, subject to the APA requirements that the decision be based on record evidence and not be arbitrary or capricious. Here, however, there is a specific presumption *against* promulgating a rule that would extend the prohibition.

While Congress did not completely deprive the Commission of authority in this area, it significantly circumscribed the conditions under which its residual authority can be exercised. Specifically, the FCC lacks the authority to extend the ban unless it finds the prohibition to be "*necessary* to preserve and protect competition and diversity in the distribution of video programming."[4] Opponents overlook the stringency of this standard as well. Thus, for example, both DIRECTV and EchoStar stress that the exclusivity ban was crucial to them in the early stages of their development.[5] Even assuming *arguendo* that this is true, it does not address the issue of sunset *now*.[6] Opponents must show necessity in 2002,[7] plainly a greater burden than the

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4 47 U.S.C. § 548(c)(5) (emphasis added).

5 *See* DIRECTV at 7; EchoStar at 4.

6 RCN claims that it relied on Section 628 in deciding to enter the MVPD marketplace, *see* RCN at 24-25, but presumably RCN knew as well that Congress scheduled the provision to sunset after a ten-year period.

7 Far from lacking access to programming today, EchoStar is now confronting the possibility of litigation for *refusing* to carry specific programming services. *See EchoStar Faces Suit Over Decision To Dump ABC Family Channel*, Communications Daily, Dec. 19, 2001 at 3.

Commission's more typical and far more flexible "public interest" authority, and a burden that cannot be met given the overwhelming record evidence regarding the competition that exists in the current MVPD marketplace.[8]

B. The Waiver Process Cannot Justify Extension of the Ban.

Some commenters assert that extending the prohibition will not cause harm because cable-affiliated programmers and cable operators may seek exclusivity through the waiver process.[9] Again, these arguments ignore the fact that Congress could have chosen to continue indefinitely with a waiver approach, but plainly did not do so.

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[8] *See, e.g.*, CBC at 2-4, 9-11 (providing evidence of competition from DBS, LEC-affiliated competitors, broadband overbuilders, and other members of its coalition); iN DEMAND at 4-7 (providing evidence of competition from DBS, MMDS, SMATV, C-band, and broadband overbuilders); IMMC at 1, 6 (describing competition to cable provided by SMATV operators throughout the United States); Joint Commenters at 18-20, app. A (describing terrestrial competitors' success at providing competition to cable in markets throughout the United States).

Some commenters have sought to inject into this proceeding questions regarding terrestrially delivered programming. Ignoring prior FCC rulings and the terms of the statute itself, these commenters would expand the prohibition to programming expressly outside the scope of Section 628. The Commission has previously construed Section 628 to apply exclusively to satellite delivered programming, *see Program Access Order*, 13 FCC Rcd. 15822, 15856-57 ¶¶ 70-71 (1998), and there is no basis to revisit that conclusion in this proceeding. Commenters also appear unable to agree on the implications of terrestrial delivery of programming. While some argue it is a subterfuge to escape the terms of the statute and/or gain increased leverage over programmers, others acknowledge that clustering is efficiency-producing and enables cable operators to be better providers of their services. *Compare* IMCC at 5 ("The MSOs have demonstrated their willingness to evade the program access rules by migrating vertically integrated programming from satellite to terrestrial delivery when threatened with competition in any given regional market") *with* BSPA at 18 n.49 ("BSPA does not challenge a cable operator's legitimate business decision to migrate regional programming to terrestrial systems given cost savings and efficiencies").

[9] *See, e.g.*, EchoStar at 11.

Congress expressly provided for a transitional period in which a presumption against exclusive dealing would apply, and after the period expired, the presumption would be eliminated. Because the waiver process to date has in fact been driven by this presumption against exclusive contracts, it necessarily has been very difficult to obtain a waiver. The Commission has considered five waiver petitions to date, and has granted two, both over seven years ago.[10] Both successful petitions were unopposed.[11] In contrast, the Commission denied three other petitions, holding that the petitioners had simply failed to overcome the statute's presumption against exclusive contracts.[12] Far from undertaking any substantive analysis that the contracts were anticompetitive, the Commission expressly indicated that "the public interest analysis does not require a specific showing of 'harm' to competitors by those opposing exclusivity."[13] Indeed, in one case, the Commission found that an earlier state agency ruling that the arrangement was not an unreasonable foreclosure on programming, that it served a legitimate

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[10] *See Petition for Public Interest Determination Under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of New England Cable News*, 9 FCC Rcd. 3231 (1994) ("*NECN Order*"); *Petition for Public Interest Determination Under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of NewsChannel*, 10 FCC Rcd. 691 (1994) ("*NewsChannel Order*").

[11] *NECN Order* ¶¶ 2, 29-31; *NewsChannel Order* ¶¶ 2, 21. Both grants involved regional and local news programming that was new to the marketplace. *NECN Order* ¶ 36; *NewsChannel Order* ¶¶ 5, 21. Both contracts were limited in geographic scope: one covered six states, the other four. *NECN Order* ¶ 31; *NewsChannel Order* ¶ 20.

[12] *See generally Time Warner Cable Petition for Public Interest Determination Under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of Courtroom Television*, 9 FCC Rcd. 3221 (1994) ("*Court TV Order*"); *Cablevision Industries Corp. Petition for Public Interest Determination Under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of the Sci-Fi Channel*, Memorandum Opinion & Order, 10 FCC Rcd. 9786 (1995); *Outdoor Life Network and Speedvision Network Petition for Exclusivity Pursuant to 47 C.F.R. § 76.1002(c)(4) and (5)*, Memorandum Opinion & Order, 13 FCC Rcd. 12,226 (1998).

[13] *Court TV Order* ¶ 33.

business need, and that it was not essential to a competitor's ability to compete was not conclusive because opponents of a federal exclusivity petition did not have to prove harm.[14]

Finally, the legal presumption against exclusivity chills *all* exclusive contracts, whether or not they are pro-competitive -- commercial considerations are subjugated to regulatory lawyers' assessments as to whether a waiver might be looked upon favorably.[15] More often than not, the contracting parties conclude that this uncertainty is too costly and forego the benefits that exclusivity might otherwise bring. Thus, contracts that might have successfully sought waivers likely are never attempted in the first place.[16] In fact, as iN DEMAND points out, the exclusivity prohibition has significantly affected its programming decisions because the current legal process for obtaining exclusivity "is a costly proposition" that "takes an inordinate amount of time to complete, generates considerable costs in legal fees . . ., and provides little assurance" that exclusivity will be granted.[17]

III. OPPONENTS ARE DEMONSTRABLY MISTAKEN ABOUT BOTH THE DEGREE AND THE EFFECTS OF VERTICAL INTEGRATION.

A. Opponents Rely upon Numerous Mistakes of Fact to Try to Support Their Arguments.

There are numerous factual errors made by opponents of the sunset. Given that their arguments are based upon erroneous premises, their position necessarily disintegrates. For

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14 *Id.* ¶¶ 12, 15, 37 & n.93.

15 *See id.* ¶¶ 24-26.

16 *Cf. 2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report & Order, WT Docket No. 01-14, FCC 01-128 ¶ 48 (rel. Dec. 18, 2001) (prophylactic cap may have discouraged beneficial transactions).

17 iN DEMAND at 16 & n.45.

example, some commenters appear to have wholly ignored AT&T's substantial restructuring, leading to the spin-off of Liberty Media that occurred months ago.[18] This spin-off separated the AT&T cable system assets and the Liberty programming assets into distinct and independent companies, further reducing the degree of vertical integration in the industry. Commenters ignore this development.

There is in fact a trend *away* from vertical integration between cable operators and programmers. As NCTA reports in its comments, in 1992 the percentage of programming services vertically integrated with cable operators stood at 48%; it is 26% today.[19] Thus, almost *three-fourths* of programming services are not vertically integrated with cable. Ironically, the one MVPD sector in which vertical integration is increasing is DBS, where, as discussed below, Vivendi's major investment in EchoStar has been coupled with its plans to acquire USA Networks.[20]

Opponents also mischaracterize the state of competition among MVPDs, along with the abundant supply of programming. Only last month, the Fourth Circuit observed that DBS (along with cable and broadcast television) is "a major force in the market for delivering television programming to consumers."[21] EchoStar's competitive force in distribution, along with its independent access to programming, were underscored in a series of announcements last month

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18 *See, e.g.*, IMCC at 4-5; BSPA at 9 (claiming erroneously that AT&T holds interests in 23% of all cable programming services).

19 NCTA at 12.

20 *Vivendi Buys USA Networks Assets*, CNN.com, Dec. 17, 2001, *available at* http://www.cnn.com/2001/WORLD/europe/12/17/vivendi/index.html.

21 *Satellite Broad. & Communications Ass'n,* No. 01-1151, slip op. at 1.

including a $1.5 billion direct investment in EchoStar by Vivendi -- the world's second largest media company -- as well as the merger of USA Neworks into Vivendi. As one analyst observed to the *New York Times*, "[w]hen you have a worldwide content powerhouse like Vivendi investing $1.5 billion in a company, that's a confirmation that satellite is competing very well against cable today."[22]

In addition to the foregoing factual errors, the record reflects a number of vague, unspecified (or facially meritless) allegations of misconduct against cable operators and/or cable programmers.[23] These claims, often made on behalf of anonymous coalition members, do not contain sufficient facts to verify (or fully rebut) and thus are essentially worthless as record evidence.[24] Further, charges that have never been brought to the Commission as complaints must be viewed with great skepticism -- commenters making such claims presumably already

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[22] Amy Harmon & Jennifer Lee, *Deal Bolsters Satellites as Cable TV Competitors*, N.Y. Times, Dec. 17, 2001, at A16.

[23] Braintree Electric Light Department ("BELD") criticizes AT&T for allegedly refusing to sell it New England Cable News, BELD at 3, but NECN has had an FCC exemption from the exclusivity prohibition, and thereafter has been delivered terrestrially since 1995 and thus has *never* been subject to the prohibition. And while BELD insists "the importance of programming provided by cable-affiliated programmers cannot be overstated," it also reveals that it has nevertheless achieved a remarkable 31% penetration success in the community it serves. *Id.* at 2, 3.

[24] CBC and RICA contain general complaints regarding access to HITS and HITS2Home. CBC at 10-11; RICA at 8. But even reading these bare bones contentions in the light most favorable to them, there is no colorable claim under Section 628, or any other part of the Act. These services are not programming services; HITS customers must contract separately with content providers to obtain the rights to the program services distributed by HITS.

have determined that they cannot prove them according to the statutory standards governing complaint proceedings.[25]

These complainants also ignore the fact that permitting exclusives is the norm; antitrust policy and communications policy both treat exclusive dealing as normal commercial arrangements that are not inherently anticompetitive. Section 628(c)(2)(D) sets forth an exceptional rule for the limited ten-year period; the sunset will return the Cable Act's treatment to the mainstream legal standards and presumptions. Fundamentally, the complaints -- specific or general -- amount to little more than blanket assertions that the competitive position of individual competitors may be disadvantaged by the sunset, but of course this is always true of the competitive process. Both the antitrust laws and the Communications Act are intended to protect "competition, not competitors."[26] Under these precedents (and, indeed, under the plain

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[25] In fact, where the allegations are made in specific detail, it is clear that no unlawful activity occurred. Everest complains that Kansas City Cable Partners treated it unfairly regarding its request for access to a certain local sports PPV event. But the facts as alleged by Everest do not show anything of the sort. Everest explains that it first learned on Tuesday, October 23, 2001, that an October 27, 2001 game would be on cable. "Despite repeated attempts, Everest was not successful in contacting anyone at Metro Sports until Wednesday, October 24, 2001" -- in other words, the *very next* day. Everest at 4**.** Everest's request was *granted* within two days and, that same day, the cable operator worked with Everest to get a test signal for a game to be played the following day. *See id.* at 4-5. Given this highly compressed timeline, Everest cannot possibly complain that it was treated unreasonably -- much less claim any legal violation.

Everest complains that it was unable ultimately to offer the game due to technical difficulties. But it confesses that "[i]t is our understanding that technical difficulties were experienced by other cable operators who attempted to receive the KU- K-State game." *Id.* at 5. This set of facts simply does not approach actionable conduct.

[26] *See, e.g., Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 224 (1993); *United States v. Western Elec. Co.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (antitrust decree is not intended to protect the "minnows" against the "trout"); *Establishment of Rules and*

(footnote continued…)

language of the statute[27]), opponents must show harm to competition. It is evident that they have failed to meet this burden.

B. Opponents Rely upon Numerous Mistakes of Economics to Try to Support Their Argument.

Economic principles teach that vertically affiliated entities in general do not have any incentive to act differently than unaffiliated companies in comparable positions. As antitrust scholars have admonished, "injury to competition should never be inferred from the mere fact of vertical integration."[28] While opponents predict dire consequences if the prohibition is lifted, they do not support these predictions. For example, DIRECTV claims that it stands to lose forty-five networks, but nowhere does it even attempt to explain how or why these programmers would find it commercially rational to purposely lose 20% of their viewers. In fact, no economic principle would support such a prediction.

Exclusive contracts are likely to occur where the contracting parties believe they can obtain substantial benefits from the arrangement. The record clearly establishes that exclusive dealing is found throughout the economy, and is generally presumed to be beneficial. Indeed, opponents of the sunset are quick to promote the benefits that flow from their own exclusive

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(…footnote continued)

Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 12 FCC Rcd. 5754, ¶ 9 & n.19 (1997).

[27] *See* 47 U.S.C. § 548(c)(5) (exclusivity prohibition must "continue[] to be *necessary* to preserve and protect competition and diversity in the distribution of video programming" (emphasis added)).

[28] Phillip E. Areeda & Herbert Hovenkamp, IIIA *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 755a (1996).

programming contracts, while ignoring the benefits when similar agreements are used by one of their competitors.[29]

Several commenters argue that they have been "discriminated against" by *non*-vertically integrated programmers.[30] These allegations are extraneous to the issue before the Commission, and certainly cannot support a decision against the sunset for vertically integrated companies. More importantly, such claims simply prove that program suppliers often have economic reasons to elect to deal with some MVPDs and not others -- reasons that are by definition unrelated to MSO ownership interests in the case of non-vertically integrated programmers. Far from supporting any argument to extend the ban, these commenters simply confirm that there are sound, lawful reasons for exclusive arrangements.[31]

Some of the commenters also complain that, unlike DIRECTV, EchoStar, and the largest cable MSOs, they are too small to be able to achieve efficiencies in programming purchasing and distribution.[32] But surely competition policy should encourage firms to perform more efficiently, not compensate those who have failed to do so. In any event, these smaller operators do in fact have ways to capture economies of scale by pooling their programming purchases together with other small MVPDs. Entities such as NCTC, NRTC, and WSNet, among others, readily aid

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29 *See* DIRECTV at 7.

30 *See, e.g.*, Qwest at 4; EchoStar at 10 & n.20; IMCC at 8-9.

31 In any event, as NCTA points out, "nearly all non-vertically integrated satellite-delivered program networks are available on DBS as well as cable even absent the applicability of the exclusivity ban to these services." NCTA at 14-15.

32 *See* BELD at 2-3; CBC at 6.

smaller MVPDs so that an aggregate number of subscribers can be brought to the negotiating table in a single contract.[33]

Finally, opponents of the sunset ignore the important costs imposed by the prohibition, most importantly its negative effects on programming supply and diversity. EchoStar actually argues that MVPDs should compete only on price rather than by seeking to offer unique programming options, going so far as to claim erroneously that the Commission has discouraged MVPDs from competing on the basis of content.[34] To the contrary, as AT&T demonstrated in its comments, government policy must take care to avoid creating incentives that would reduce programming supply and even commoditize it.[35]

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[33] *See* National Cable Television Cooperative, Inc., *What is the NCTC?* (noting that its 1,000 member companies serve over 10 million customers), *at* http://www.cabletvcoop.org/everyone/Prospect/What_Is.htm (last visited Dec. 21, 2001); NRTC at 2 (noting that its 705 rural electric cooperatives, 128 rural telephone cooperatives, and 189 independent rural telephone companies located in 46 states deliver multichannel video programming to over 1,800,000 customers); WSNet at 2 (noting that WSNet serves approximately 1,200 operators with 800,000 customers).

[34] *See* EchoStar at 7 (claiming the FCC has encouraged MVPDs "competing over price with an undifferentiated product"). *See also* Digital Broadcast Corp. at 7 (MMDS must be able to offer the "same prime programming" as cable companies).

[35] *See* AT&T at 13 (citing *Paddock Publ'ns., Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) ("a market in which the creators of intellectual property …could not decide how best to market it for maximum profit would be a market with less (or less interesting) intellectual property created in the first place. No one can take the supply of well researched and written news as a given; legal rulings that diminish the incentive to find and explicate the news (by reducing the return from that business) have little to commend them"), *Ralph C. Wilson Indus. v. Chronicle Broad. Co.*, 794 F.2d 1359, 1367 (9th Cir. 1986) (concurring op.) ("the absence of exclusivity might result in a popular program being shown by several stations simultaneously, which would reduce consumer choice *pro tanto*"), and *Woodbury Daily Times Co. v. Los Angeles Times*, 616 F. Supp. 502, 511 (D.N.J. 1985) (exclusivity between newspapers and news services ensures that "the reading public has access to a wider variety of news reporting and opinions")).

IV. CONCLUSION

As shown above and in AT&T's initial comments, the Commission should act pursuant to the statutory directive and allow Section 628's prohibition on exclusive contracts to sunset.

Respectfully submitted,

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